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IN THE

Supreme Court of the United States

October Term, 1982

CARPET SEAMING TAPE LICENSING CORPORATION,
a Texas corporation,

Petitioner,

vs.

BEST SEAM, INCORPORATED, a California corporation,

Respondent.

CARPET SEAMING TAPE LICENSING CORPORATION,
a Texas corporation,

Petitioner,

vs.

VECTRON INDUSTRIES, INC., a California corporation, and
EUGENE J. TASSE, an individual,

Respondents.

**REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI AND SUPPLEMENT
TO THE APPENDIX**

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IN THE
Supreme Court of the United States

October Term, 1982

No. 82-1875

CARPET SEAMING TAPE LICENSING
CORPORATION, a Texas corporation,
Petitioner,
vs.

BEST SEAM, INCORPORATED,
a California corporation,
Respondent.

CARPET SEAMING TAPE LICENSING
CORPORATION, a Texas corporation,
Petitioner,
vs.

VECTRON INDUSTRIES, INC., a California corporation,
and EUGENE J. TASSE, an individual,
Respondents.

**REPLY TO RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI AND
SUPPLEMENT TO THE APPENDIX**

I. Respondents Are Wrong In Claiming That Petitioner's Principal Point Was Not Raised, Litigated and Passed Upon in the Lower Courts.

Respondents are wrong in claiming that the issues raised by this Petition, concerning the unavailability of the Walters' work as prior art, were not raised before the lower courts. Respondents first advised Petitioner that they intended to present a defense based on the work of Mr. Walters in July 1980, the month before trial. Petitioner presented its arguments against the availability of the Walters' work as prior art in a brief filed immediately after Mr. Walters had testified. The brief, "Plaintiff's Post Trial Brief on the Walters' Prior Invention Defense and Powell Derivation Defense," was served and filed on September 4, 1980, pursuant to Judge Real's order from the bench on September 2, 1980 (RT 9-2-80:112), before final argument on September 5, 1980. A copy is reproduced at the end of this Reply as a Supplement to the Appendix.

The trial court implicitly ruled for Petitioner on the unavailability of Walters' work as prior art because its findings (drafted by Respondents' counsel) on the issue of obviousness, Nos. 110e, 110f and 155m, carefully avoid any reliance upon the work of Walters as prior art. Judge Real relied on the work of Walters only for the derivation defense, which the Ninth Circuit subsequently reversed.

Petitioner can hardly be faulted for not repeating its arguments against Walters as prior art in its appeal to the Ninth Circuit when the trial court had not utilized Walters as prior art for the obviousness defense. The first time that Walters' claim, to have face seamed with precoated tape, was used as prior art for the obviousness defense was when the Ninth Circuit did so, *sua sponte*, in its opinion. At that point, Petitioner repeated its arguments concerning the

unavailability of Walters as prior art in its petition for rehearing, as Respondent admits (Oppn. 6).

Accordingly, because the issues of this Petition were raised in the lower courts, the precedents cited by Respondent (Oppn. 6-7) concerning issues raised for the first time before this Court, are not on point.

II. Respondents Misunderstand the "Two-Court Rule" in Attempting to Apply It to the Issue of Obviousness of a Patent.

Respondents argue that this Court should not reverse the holding of obviousness on a theory that, because the appellate court affirmed the trial court, there is a "two-court rule" which should bar review. Respondents rely upon *Berenyi v. Immigration and Naturalization Service*, 385 U.S. 630, 636, 87 S.Ct. 666 (1967) for the proposition that this Court should not overturn the decision of lower courts on "purely factual issues" when their resolution turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court. In *Berenyi*, a naturalization case, the issue was whether the petitioner had at one time been a member of the Communist Party in his native land. The petitioner relied on his testimony that he had not been a party member against the testimony of the two witnesses who testified that he had.

This patent case is not a suitable one for application of the two-court rule situation because the issue of obviousness is not a "purely factual issue". Obviousness of an invention, although based upon several factual inquiries, is ultimately a legal conclusion, *Graham v. John Deere Co.*, 383 U.S. 1, 17, 86 S.Ct. 684, 694 (1966); *Nickola v. Peterson*, 580 F.2d 998, 911 (6th Cir. 1978);

cert. denied, 440 U.S. 961 (1979); *Stevenson v. International Trade Commission*, 612 F.2d 546, 549 (C.C.P.A. 1979). Further, the relative credibility of Mr. Walters and Mr. Powell compared to other witnesses is not involved on most of the factual inquiries involved in reaching the legal conclusion of obviousness. They did not testify, for example, concerning the basic factual inquiries mandated by *Graham v. Deere* into the scope and content of the prior art and its differences from the claimed inventions. Nor did they testify concerning such secondary considerations as failure of prior workers, long-felt need or commercial success. In sum, because obviousness is not "a purely factual issue" and because many of the factual inquiries which it involves do not turn on assessments of relative credibility, the two-court rule is not suitable to this case.

Respondents, in apparent concession of their inability to meet their burden of proving that Walters actually face seamed with precoated tape before Mr. Burgess, shift their reliance upon Mr. Walters to his testimony at trial that it was obvious to do so (Opp. 9). It would effectively sweep aside the precedents (Pet. 16-17) that have required corroboration of a claim of prior invention to permit a self-proclaimed inventor, who is unable to corroborate his claim, to defeat the patent by falling back to the easier assertion that the patented invention would have been obvious.

III. Respondents' Fail to Show That Petitioner Has Misread the Opinion of the Court of Appeals.

While the title of Section III of the Opposition asserts that Petitioner has misread the appellate opinion, Respondents' arguments fail to show any respect in which Petitioner has done so.

Respondents cite *E. I. duPont de Neumours & Co. v. Berkley and Co.*, 620 F.2d 1247 (8th Cir. 1980) for the proposition that corroboration of the work of a prior inventor is not always required. Respondents neglect to point out that the *duPont* court held that unsupported oral testimony "must be regarded with suspicion and subjected to close scrutiny" and that it proceeded to find the oral testimony of an alleged prior user and five supporting witnesses insufficient to establish a prior use (at pp. 1261-62). In the present case, not even one witness testified that he had seen Mr. Walters face seam with a precoated tape. No case has been cited by Respondents in which the burden of proof imposed on one claiming a prior use has been carried just by the oral testimony of the self-proclaimed prior user.

Respondents next argue that Walters' work was not abandoned. In doing so, they ignore *International Glass Co. v. United States*, 408 F.2d 395 (U.S. Ct. Cls. 1969), cited and quoted in the Petition at page 19, which holds that abandonment is a legal conclusion that follows if the inventor never takes steps to make it publicly known, or to file a patent application, or to describe the invention in a publicly disseminated document or to use the invention publicly. Walters did none of these things (Pet. 13).

Respondents accuse Petitioner of omitting any reference to a "key fact" that Thermogrip adhesive was allegedly the first to be effective for carpet seaming (Opp. 12). This supposed key fact was dismissed by the Ninth Circuit as "without any support on the record" (694 F.2d at p. 576, fn.6).

IV. Respondents May Not Evade The Need for Corroboration of Claims of Prior Invention, Which Fail to Qualify as Prior Art, by Renaming the Same Claims "Evidence of Obviousness".

Respondents have not mentioned or tried to distinguish the leading precedents (Pet. 16-17) which require corroboration of a claim of prior invention. Nor have they mentioned or tried to distinguish any of the leading precedents (Pet. 18-19) which reject as prior art a claimed prior use that was abandoned without communication to the public. Respondents' silence is a mute concession that the uncorroborated and abandoned work of Walters fails to qualify as prior art.

Instead, Respondents propose that, if the claims of Mr. Walters fail to qualify as prior art, they may be renamed "evidence of obviousness" to make them available. If such word play could evade the requirement of corroboration, the safeguards created by the courts to protect successful inventors against the unjustified claims of those who fancied themselves as prior inventors would be washed away. Examination of the cases cited by Respondents (Opp. p. 13) does not, however, support their theory.

In *Servo Corp. v. G. E. Co.*, 337 F.2d 716 (4th Cir. 1964), *cert. denied*, 383 U.S. 934, *rehearing denied*, 384 U.S. 914 (1966) the court relied on proposals advanced by a Mr. Fattor as evidence of obviousness (337 F.2d at 720). Mr. Fattor's proposals were documented in a patent application and in a proposal which he had presented to the Association of American Railroads, as described in the lower court opinion, 220 F. Supp. 473 at p. 482 (W.D. Va. 1963). In *Felburn v. New York Central Railroad Co.*, 350 F.2d 416 (6th Cir. 1965), *cert. denied*, 383 U.S. 935 (1966), the court relied upon prior work of one Behrens as

evidence of obviousness (at p. 425). The Behrens invention was embodied in a brochure, disclosing a freight-handling system virtually identical to that claimed in the patent-in-suit, which he had distributed to the trade (at p. 424).

Neither *Servo Corp.* nor *Felburn* supports Respondents in their theory that uncorroborated oral testimony of a prior inventor can be relied upon as evidence of obviousness. In both those cases, there was unimpeachable contemporary documentation of the prior invention, which provided the basis that the court used for its determination of obviousness. No such documentation exists of Mr. Walters' claim to have face seamed with precoated tapes and there is no support from any witness who can recollect that he did so.

The remaining three cases cited by Respondents (Opp. 14) are *Del Mar Engineering Laboratories v. United States*, 524 F.2d 1178 (U.S. Ct. Cls. 1975); *Lockheed Aircraft Corp. v. United States*, 553 F.2d 69 (U.S. Ct. Cls. 1977) and *Simmons Precision Products, Inc. v. United States*, 153 U.S.P.Q. 465 (U.S. Ct. Cls. 1967) at page 14 of the Opposition. Each of those cases involved a prior invention which was under a national security classification and, therefore, not available to the public. On policy grounds, the courts in these cases held that the circumstance of a national security classification should not prevent prior inventions from being used as evidence of obviousness. The rationale of these cases based on national security considerations is not applicable to the present situation where Walters' prior use is unavailable, not because it is under a national security classification, but because it was uncorroborated and abandoned.

V. Judge Real's Record in Patent Cases Speaks for Itself.

It is not Petitioner's purpose on this appeal to be led by Respondents into an *ad hominem* attack upon Judge Real. In drawing attention to Judge Real's record of invalidating all of the twenty patents that he has adjudicated in his lifetime career, Petitioner has done so for the limited and necessary purpose of making clear that the trial court's findings, written by Respondents' counsel, should be viewed with a particularly critical eye.

Respondents assert that Judge Real has seldom been reversed in patent cases. Respondents gloss over the fact that Judge Real has been reversed *twice* in this case in holding the three Burgess patents invalid for fraud on the Patent Office and for patent misuse on grounds which the Ninth Circuit held both times were without legal or factual support. He was reversed for improvidently granting summary judgment of patent invalidity in *Northrop Architectural Systems v. Lupton Manufacturing Co.*, 437 F.2d 889 (9th Cir. 1971).

Conclusion

Respondents' Opposition does establish two things. First, that the obviousness defense cannot be sustained without reliance upon the claim of Mr. Walters to have face seamed with precoated tape before Mr. Burgess. Second, that Petitioner has been unable to justify the Ninth Circuit's rejection of the well-established law that makes the Walters' prior use unavailable because it is uncorroborated and was abandoned without communication to the public. If certiorari were to be granted, the conclusion is inescapable that the finding of obviousness would have to be reversed.

In apparent recognition of this result, Respondents' brief makes several references to the creation of the new Court of Appeals for the Federal Circuit (C.A.F.C.). Because the C.A.F.C. is not involved in this appeal, Respondents' references are a thinly veiled hint to this Court to decline certiorari and leave it to the C.A.F.C. in some future case to correct the error in the law introduced by the Ninth Circuit's reliance on an uncorroborated, abandoned and non-public prior use. Petitioner submits that this Court should reject such an approach because of the public importance of the issue involved, because of the stature of these inventions and because it would be unjust.

No issue could be of greater importance of maintaining the incentive to inventions provided by the patent system than preventing weakening of the safeguards which protect inventors against the meritless claims of fancied prior inventors that successful inventions frequently spawn. The inventive community should not be exposed on the basis of the Ninth Circuit's error to years of uncertainty until another case finds its way to the C.A.F.C. presenting the same issue.

The Burgess inventions, it is conceded, are among the rare group of inventions that have revolutionized the way an entire trade conducts its basic skill. They have attracted great attention among the thousands of people who depend upon carpet installation for their livelihood. For inventions of such prominence to be struck down by the Courts on an unsubstantiated claim of prior invention would have a visible and negative public impact upon the worth of patents and the willingness of the courts to protect inventors. The public importance of the patents speaks strongly for this Court's review by certiorari.

Finally, it would be unjust. The Ninth Circuit has found that Mr. Burgess did not derive his inventions from Walters but started at the point in which the art had been deadlocked for thirty years, the knowledge that hot-melt could be applied to join carpet by back seaming. From this point, he made the breakthrough that liberated carpet installers from the endless drudgery of sewing long seams by hand and speeded and simplified installation of carpet throughout the land. Against this achievement, it would be fundamentally unfair for Mr. Burgess to be deprived of the reward promised by his patents by perpetuation of the basic error of patent law made by the Ninth Circuit.

Respectfully submitted,

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SUPPLEMENT TO THE APPENDIX

**Plaintiff's Post Trial Brief on the Walters'
Prior Invention Defense and the Powell
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*Supplement to the Appendix—Plaintiff's Post Trial
Brief on the Walters' Prior Invention Defense
and the Powell Derivation Defense.*

IN THE UNITED STATES DISTRICT COURT
For the Central District of California

Civil Action No. 76-2738-R

CARPET SEAMING TAPE LICENSING
CORPORATION, a Texas corporation,
Plaintiff,

v.

BEST SEAM, INCORPORATED,
a California corporation,
Defendant.

Civil Action No. 76-3196-R

CARPET SEAMING TAPE LICENSING
CORPORATION, a Texas corporation,
Plaintiff,

v.

VECTRON INDUSTRIES, INC.,
a California corporation; and
EUGENE J. TASSE, an individual,
Defendants.

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INTRODUCTION

The Burgess inventions that have revolutionized carpet installation are founded on an entirely new concept—face seaming with a paper backed hot-melt tape prepositioned under the carpet edges by applying heat directly to the adhesive from between the upraised carpet edges. The Patent Office allowed the Burgess patents over extensive prior art showing the long known but never adopted technique of back seaming using a hot-melt tape, backed with a barrier, applied to the carpet backs by an iron pressed against the barrier. Mr. Burgess has described how he became interested in attempting to devise a way to use hot-melt glue to make carpet seams after a demonstration made to him at the beginning of 1966 by a Mr. Buzz Powell who utilized a hot-melt glue gun in his presence to join two scraps of carpet from the back.

If that was all Mr. Powell disclosed, it adds nothing to the case, it is less relevant than the cited prior art. If Defendants are to make anything of their asserted Walters and Powell defenses, they must prove more. For a prior invention defense based on the work of Mr. Walters they must prove (i) that Mr. Walters faced seamed with a paper backed hot-melt tape before Mr. Burgess, and (ii) if so, that his work did not fall into disuse without being communicated to the public. For a derivation defense under 35 U.S.C. 102(f), Defendants must prove that the concept of face seaming with a paper backed hot-melt tape was not Mr. Burgess' original contribution but was disclosed to him by Mr. Powell.

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**PART A: THE WALTERS PRIOR INVENTION
DEFENSE**

**PROOF OF PRIOR INVENTION BY ORAL
TESTIMONY MUST BE BEYOND A REASONABLE
DOUBT**

The claims of those who emerge from obscurity only after the success of a patented invention to assert that another was first, are regarded with suspicion by the courts, *Washburn and Moen Mfg. Co. v. Beat 'Em All Barbed-Wire Co.* (The Barbed Wire Case), 143 U.S. 275, 12 S.Ct. 443 (1892); *Food Machinery Corp. v. Pacific Can Co.*, 66 F.Supp. 109 (N.D. Cal. 1946); *Lockheed Aircraft Corp. v. United States*, 553 F.2d 69, 75 (Ct. Cl. 1977). As the Supreme Court ruled long ago in the *Barbed Wire* case, *supra*,

“In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory, and beyond a reasonable doubt.” (At p. 447)

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**THE PROOFS PRESENTED OF PRIOR INVENTION
BY WALTERS**

*No Evidence Corroborates Mr. Walters' Claim to Have
Face Seamed With A Precoated Tape Before Mr. Burgess*

The only physical evidence produced in support of the Walters' story is a joined section of carpet, Dx DN, removed in 1970 from an installation which Mr. Walters testified had been made at the Warm Springs golf shop on January 31, 1966. That carpet was installed by back seaming utilizing glue guns to squirt molten hot-melt on the carpet backs followed by application of an open mesh tape pressed into the glue with the tip of the gun, Walters TR. 87:3-10).

The only Walters' 1966 documents containing a description of his method of using hot-melt are his April 6, 1966 letter to U. S. Shoe Machinery Co., Dx DE, and his disclosure document, Dx CQ, ostensibly dated February 28, 1966, Dx CQ. His April 6, 1966 letter on its face describes back seaming, which Mr. Walters confirmed at the trial, Walters TR. 83:15-84:2. The disclosure of technique in document Dx CQ is the same description of back seaming which appears verbatim in April 6 letter.

Mrs. Walters testified that she never personally saw her husband install tape at all, Patricia Walters Dep. p. 7.

Mr. Powell claimed to have seen Walters face seam using a glue gun to extrude molten glue onto the tape and press on the edges, Powell Dep. 19-20. He

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characterized that as, "Face up it was a pain in the can the way we were doing it with that little gun.", Powell Dep. 19:14-15.

Mr. Powell could not remember whether Walters showed him face seaming with premade tape, as follows:

"Q. Did Mr. Walters show you any premade tape that had already contained cooled hot melt adhesive?

"A. I just told you that.

"Q. Did he use that tape to face-seam?

"A. I don't remember." [Powell Dep. 21:1-5]

*There Is No Physical Evidence Or Corroborated
Documentation of Backed Hot-Melt Tape Made by
Walters Before Burgess*

The only physical piece of tape that has been produced is the tape attached to the carpet removed from the Warm Springs golf shop, Dx DN. That tape has no backing.

Although there was a photograph Dx DT of a piece of tape which Walters claims to have been the type of tape he made before January 31, 1966, Walters TR. 61:2-8, on cross-examination he could not say for a fact whether "... this is the actual tape I made or not ...", Walters TR. 88:13-89:12. The existence and date of origin of the piece of tape shown in Dx DT was not corroborated by the testimony of any other witness.

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The April 6, 1966 letter, Dx DE, provides no evidence that, if any samples were enclosed, they were other than pieces of uncoated "...nylon or fiberglass mesh or cotton duck". Those are the only materials referred to in this letter and the letter makes no reference to a backing of any kind. Mr. Walters, himself, cannot say for certainty whether he sent U.S.M. a piece of tape or not (Walters TR. 76:5-8). He attempted to recover his letter and any samples that might have been attached from U. S. Shoe Machinery Co. at the beginning of 1970. However, U.S.M. had no such letter or any samples in its file or correspondence with Mr. Walters, PX 163.

The only document to refer to a backing is a Memorandum, Dx CQ, bearing a spurious notarization, Mr. Walters testified, without corroboration, that Dx CQ had been signed on February 28, 1966 by a notary, who affixed his notarial stamp after he had witnessed Mr. Walters sign the document before him on that day, Walters TR. 80:21-81:4. The supposed notary, Mr. Louis Lester, Jr., is Mr. Walters' business partner and the brother of Mr. Walters' wife. There is no official record of a notary public named Louis Lester, Jr. in any county in the State of Georgia on February 28, 1966, PX 168. A falsified notarization on a document calls into question the credibility of any witness who would resort to such extreme conduct.

*Mr. Walters' Work Went Into Disuse Without Being
Communicated to the Public*

Mr. Walters testified that he had quit making seaming tape by about May, 1966, Walters TR. 91:4-20. He never

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pursued the manufacture of his tape on a commercial basis, Walters TR. 76:16-18. He never started along the path to make his work public by applying for a patent, Walters TR. 91:22-25. He never took any steps to bring his ideas to public knowledge by giving any demonstrations, publishing articles, or contacting local newspapers or installation trade magazines, Walters' TR. 92:2-11. Mr. Walters never contacted any installation products manufacturer concerning his invention until after the Burgess patent had issued and it had already become apparent to him that hot-melt seaming was a successful invention, Walters TR. 92:12-20. Even then, his purpose was not to enrich the art but himself by advancing a "... legal claim ..." for himself to a share of whatever money was to be made, PX 166, Walters TR. 94:10-19.

*DEFENDANTS HAVE NOT PROVED BEYOND A
REASONABLE DOUBT THAT MR. WALTERS FACE
SEAMED WITH A HOT-MELT TAPE BEFORE MR.
BURGESS*

The Burgess inventions rest on the concept of face seaming sections of carpet using a paper-backed hot-melt tape prepositioned beneath the sections with heat being applied directly to the adhesive from between the upraised carpet edges.

There is no physical evidence that corroborates Mr. Walters' claim to have made face seams similarly before Mr. Burgess. All the 1966 documentation that has been provided, Dx DE and Dx CQ, describes only the making of back seams. Mrs. Walters never saw her husband make face seams. Mr. Powell does not remember seeing Mr. Walters face seam with a premade tape.

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Mr. Powell did describe seeing Mr. Walters making face seams with a glue gun but that way, "Face up it was a pain in the can...." Even that is only corroboration of rudimentary activities which fall far short of the patented Burgess inventions. As stated in *Stearns v. Tinker and Razor*, 220 F.2d 49, 55 (99th Cir. 1955),

"The evidence does not show use, commercial or otherwise, but shows only unsuccessful experiments; and such experiments cannot anticipate or negative invention, [citations]."

Such unsupported oral testimony fails the test of proof beyond a reasonable doubt required to sustain the defense of prior invention. A pertinent recent precedent is *Lockheed Aircraft Corp. v. United States*, 553 F.2d 69 (Ct. Cl. 1977) in which the patent-in-suit to one Richter was attacked on the basis of alleged prior invention by two earlier inventors Leopard and Hair. Three persons, Leopard, Hair and a coworker, McMurran, testified to the prior invention. Finding that evidence insufficient to meet the test of proof beyond a reasonable doubt, the Court held,

"Indeed, the oral testimony of witnesses, speaking only from memory in regard to past transaction has, in the absence of contemporaneous documentary or physical evidence, consistently been found to be of little probative value. [citations] Such uncorroborated testimony is insufficient to show anticipation, within the meaning of 35 U.S.C. Sec. 102, of an issued patent [citations]." [At p. 75]

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*THE WORK OF A PRIOR INVENTOR WHICH
WENT INTO DISUSE WITHOUT BEING
COMMUNICATED TO THE PUBLIC DOES NOT
INVALIDATE THE PATENT OF A SECOND
INVENTOR*

The activities of Mr. Walters commenced in January, 1966. They are less than one year before Mr. Burgess filed the application on December 6, 1966 from which all the patents-in-suit issued. There is, therefore, no question of a one year public use or on sale statutory bar under 35 U.S.C. 102(b) involved in this case.

*A Second Inventor Is Not Deprived Of His Patent by the
Efforts Of An Earlier Inventor Which Went Into Disuse
Without Being Communicated to the Public*

The objectives of the patent system are served by an inventor such as Mr. Burgess who both applies for patent protection and makes his invention known directly to the public promptly. They are not served at all by an inventor such as Mr. Walters who neither applies for a patent nor takes any other steps to communicate his knowledge to the public. Even if, *arguendo*, Mr. Burgess was an independent second inventor whose patented inventions had been preceded by Mr. Walters, it has been the law for more than a hundred years that the second inventor is not to be deprived of his patent by a prior inventor whose work went into disuse without communicating it to the public, *Gayler v. Wilder*, 51 U.S. 477 (1850). It is a principle of enduring vitality, *Mason v. Hepburn*, 13 App. D.C. 86

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(D.C. App. 1898); *Gillman v. Stern*, 114 F.2d 28 (2nd Cir. 1940); *Brokaw v. Vogel*, 429 F.2d 476, 480 (C.C.P.A. 1970); *Hughes Aircraft Co. v. General Instrument Corp.*, 275 F.Supp. 961, 983 (D.R.I. 1967). As stated by Judge Learned Hand in *Gillman*,

“In *Gayler v. Wilder*, 10 How. 477, 481, 497, 13 L.Ed. 304, the question was whether the condition—which has always been in the statute—that the patentee must be the ‘first and original inventor’ was defeated by anyone who had earlier conceived the same invention, or only by one who had also in some way made public his results. A majority of the court held that only the second would defeat a patent on the ground that what had not in fact enriched the art should not count; and the doctrine is now well fixed.” [At p. 31]

Without proof that whatever face seaming work with hot-melt Mr. Walters may have performed was communicated to the public or to Mr. Burgess (see following section), such work also fails as prior art for purposes of an obviousness defense under 35 U.S.C. 103. As held in *In re Clemens*, 622 F.2d 1029 (C.C.P.A. 1980),

“To the contrary, where this other invention is unknown to both the applicant and the art at the time the applicant makes his invention, treating it as 35 U.S.C. Sec. 103 prior art would establish a standard for patentability in which an applicant's contribution would be measured against secret prior art. Such a standard would be detrimental to the innovative spirit the patent laws are intended to kindle.” [At pp. 1039-1040]

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The present case comes squarely within the foregoing precedents. Mr. Walters did nothing to communicate his invention to the public. He did not apply for a patent which would, upon its issuance, have informed the public of his ideas. He did nothing to enrich the art by communicating his ideas directly to the public. Mr. Walters short lived efforts died approximately five months after he started and he did nothing further. They benefited no one. If Mr. Burgess had not independently made his own inventive contribution, persevered despite discouragement, and made his inventions a success through his single handed determination and personal effort, there is no reason to believe that carpet installers would not still be squatted on their haunches laboriously sewing carpet seams by hand or waiting around for liquid adhesives to dry on installation jobs. It is what Mr. Burgess achieved with his inventions, not what Mr. Walters gave up on, that the patent system is intended to reward.

*PART B: THE POWELL DERIVATION DEFENSE
BURDEN OF PROOF*

To prove prior invention by another by oral testimony, it is, as previously described, necessary to do so by proof beyond a reasonable doubt, *Barbed Wire, supra*. Logic suggests that the same test should be applied for the defense of derivation because derivation could hardly occur unless it was proved that someone had previously made the invention allegedly derived.

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Defendants, however, assert that the test should be proof by "... clear and convincing evidence ..." citing *Johnson & Johnson v. W. L. Gore & Associates*, 436 F.Supp. 704 (D. Del. 1977) and *Campbell v. Spectrum Automation Company*, 513 F.2d 932 (6th Cir. 1975). Even if that burden of proof is applied, the proofs presented here still fail. They fall far short of clear and convincing evidence that Mr. Powell disclosed the patented inventions to Mr. Burgess.

*THE PROOFS PRESENTED ON DERIVATION
FROM POWELL*

Mr. Burgess

In his trial testimony on July 13, 1977, Mr. Burgess testified as follows concerning the demonstration by Mr. Powell:

"Q. Will you describe as well as you can remember after this long time what Mr. Powell did demonstrate to you?

"A. Mr. Powell—I gave Mr. Powell a couple of scraps of carpet and he trimmed the edges for a back seam process, that you would normally do for any type carpet, and he took the glue gun and extruded adhesive along the abutted edges of those two pieces of carpet, about six inches long, and then he took a piece of burlap that he cut and placed on the hot melt.

"Q. Now was the carpet with the pile facing up or the pile facing down at this time?

"A. The pile was facing down.

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"Q. And he extruded the hot melt on the backs of the carpet along the edges, is that right?

"A. Along the edges, yes.

"Q. And then put a strip of burlap on it?

"A. Yes.

"Q. Did Powell tell you that it was his idea to pre-coat the tape with hot melt and reactivate it later?

"A. No, that was my idea.

"Q. Did Powell ever describe the idea of pre-coating the tape to you?

"A. No. Powell told me that he was going to work on a larger glue gun, that he had a friend in the machine shop business in North Carolina and he was going to get him to make a larger glue gun for him. And every time Powell stopped by on his regular trips I would ask him if he had developed the gun and he said, 'No, I'm still working on it,' but he never did produce the gun.

"Q. Did Powell demonstrate or tell you about the use of any kind of barrier, newspapers, for example?

"A. None at all.

"Q. Did Powell tell you how much adhesive you have to have per foot?

"A. No, he didn't." [TR. 23:11-24:20]

Although Mr. Burgess' testimony on the resumed trial on August 6, 1980 has not yet been transcribed, it was unchanged to the recollection of Plaintiff's counsel.

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Charles Hall

As Mr. Powell testified, there was one of Mr. Burgess' employees present "...all of the time..." during Powell's visit Powell Dep. 38:5-6. Mr. Charles Hall, a former employee of Burgess Carpet Center, testified that he was present with Mr. Burgess "...during the entire time..." of Mr. Powell's visit, Hall Dep. 8:12-16 and 16:5-9. Mr. Hall described what occurred during Mr. Powell's visit as follows:

"Q. Can you describe what you remember of that visit.

"A. On that visit during the contact, and I'm sure you want to know about the glue, he had a small glue gun that I think was from American Shoe Company, also their glue pellets, and he wanted to show Charlie and myself a demonstration that he had seen some place. And he had us get an old sample and we cut the sample in two pieces and he took the glue gun that had been plugged in and heating and took the pellet and ran a small bead of glue along the edge, the cut edge, of one piece of carpet. And after running the bead he stuck the two pieces together and we laid it on the floor. And after talking a few more minutes to Charlie about, I think, the strength of the glue, the fact that he had seen it and it was awfully hard to pull loose, he had us try to pull the two pieces of carpet loose. And Charlie and I, after some effort, pulled it loose. It had quite a bit of strength." [Hall TR. 4:16-5:8]

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Hall testified on direct examination that Powell did not describe the use of, or show the use of, a tape of any type on that occasion, Hall Dep. 6:25. Nor did Mr. Powell describe face seaming with hot-melt glue, Hall Dep. 7:23-25. On cross-examination, Mr. Hall testified further as follows:

"Q. Are you absolutely positive that Mr. Powell never offered the suggestion to use carpet seaming tape in conjunction with the glue, whether it be face seaming or back seaming to seam carpet?

"A. No.

"Q. You are not sure?

"A. No.

"Q. He could have made that suggestion?

"A. Not on that first meeting.

"Q. You are positive he didn't say anything about it on that first meeting?

"A. I'm positive. The only thing that was talked about was the glue gun." [Hall Dep. 15:4-16]

* * * *

"Q. How long normally did he [Powell] spend when he came up to take an order?

"A. Probably 30 minutes for the order and two hours shooting the breeze. He was a nice guy and I like him. I think the fact that he presented an idea, it was great. But the idea of the iron, the idea of top face seams were Charlie Burgess' entirely. Didn't have anything to do with Buz.

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"Q. You say he showed you the idea with the glue, butting the carpet—

"A. The strength of the glue. I think the formulas, the many nights that we all spent including myself with different formulas and Eastman Kodak down, and the seaming tape or the heat melt tape was strictly a Burgess product. It had not one darned thing to do with Buz. The seed was planted. You know, if you plant a seed and a farmer raises it he gets the benefit of the crop." [Hall Dep. 18:23-19:14]

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"Sure, Fuz talked to Mr. Burgess several times about ideas at later times but nothing was said about an iron. Mr. Burgess, as far as I know, at that time was the only one working with a face seam and using an iron." [Hall Dep. 21:17-20]

Buzz Powell

Mr. Powell testified that he had demonstrated using a glue gun to Charles Burgess to glue two pieces of carpet together without a tape and also making a back seam with the glue gun utilizing some jute as a reinforcer, Powell Dep. TR. 29:21-30:10. Mr. Powell confirmed that he did not use an iron at all during his demonstration with Mr. Burgess, just the glue gun, Powell Dep. 32:16-20.

In describing how he made the back seam, Powell said that he would have taken two pieces of carpet, put the glue onto the carpet backs and put tape on top of the glue, pressing it in, Powell Dep., 35:21-36:15. He also

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claimed he had told Mr. Burgess that Walters had used standard seaming tape with adhesive on it having a paper backing, Powell Dep. 32:21-33:1.

Mr. Powell's description of the face seaming demonstration, that he claims he made, was as follows:

"Q. Do you remember specifically how you did the face-seaming?

"A. I don't remember the specifics of how I did it. I remember doing it.

"Q. As best as you can recall?

"A. We weren't working with big pieces of carpet. We were working with things like two or three feet long because it's easier to handle it and it's scrap. I remember we put some tape down and I just worked it in by using the glue gun and working it in from the face. You work your seam together, and that's the way I did it." [Powell Dep. 36:16-25]

Powell has never produced a single 1966 document or piece of physical evidence to corroborate his testimony, Powell Dep. 15:18-25.

CREDIBILITY

The status of being an inventor does not, as Defendants appear to assume, automatically stigmatize Mr. Burgess as a person less worthy of belief than other citizens. No evidence has been presented attacking Mr. Burgess' reputation for truthfulness. His testimony has not been shown to be any less deserving of credibility than Mr. Powell's.

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Mr. Charles Hall has no reason to shade his testimony in favor of Mr. Burgess. As Defendant brought out on cross-examination, Mr. Hall is somewhat resentful of Mr. Burgess, as follows:

"Q. Within the last 13 to 14 years since this all took place who have you spoken to in regard to this event?

"A. Probably everybody that worked at Burgess because I griped a lot about Charlie selling the company when I ran his company for five years. I was supposed to run it, keep his seaming company going, and I was supposed to never have to worry again as long as I lived, and he gave me a check for \$25.00, so, you know, any testimony I give here is honesty because I feel like Charlie gave me a shaft, so you can go from there.

"Q. You say you haven't spoken to Mr. Burgess in ten years.

"A. Probably longer than that but ten; I'm estimating. Not since he sold the company have I spoken to him." [Hall Dep. 11:9-22]

Mr. Powell, as described by Mr. Walters, is "... a big talker", Walters TR. 87:11-18. Mr. Stamm, who testified in 1977, described Mr. Powell as follows:

"Q. Did he [Powell] have any involvement in this heat seaming development?

"A. Not to my knowledge, he didn't. I mean we discussed things. Buzz would sit around the shop and talk for hours on and about, you know, melting

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really. He never come up with any idea of his own. It was always somebody else's idea that he thought he could capitalize on. But as far as I know, he never did.

"Q. When did you have these conversations? After the time that you learned about the Burgess invention?

"A. Yes.

"Q. What sort of man was Powell?

"A. Well, he is kind of a guy, a salesman that exaggerates a lot. If you are buying anything from him, you have to be real careful because he will oversell you on the product. He is a little bit—I don't know what the word is." [Stamm Dep. 21:19-22:11]

Since these events of 1966, 14 years ago, Mr. Powell has met in numerous conferences with Mr. Walters, Powell Dep. 60:12-61:13, and on several occasions with the attorney, Leonard Kalish, who formerly represented Consolidated Foods, Powell Dep. 56:1-58:23. Mr. Powell's recollection appears to jumble together earlier and later events as though they had all occurred together before his demonstration visit to Mr. Burgess. It is streaked with inconsistencies with other evidence and testimony, as well as its own internal conflicts.

For example, Mr. Powell testified that the Warm Springs Golf Shop job was installed with a precoated tape having a backing and that it was applied to the backs of the carpet sections by an iron, Powell Dep. 63:1-

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64:9. Yet the carpet pieces removed from the Warn Springs shop, Dx DN, have no backing and the method of installation was by applying glue to the carpet backs with a gun and pressing on an open mesh tape with the top of the glue gun, Walters TR. 87:3-10. Powell testified that Mr. Walters showed him his correspondence with United Shoe Machinery Company, Powell Dep. 17:17-25, on his first visit to Walters which was two or three days before February 4, 1966, Powell Dep. 6:20-7:1. Yet the earliest correspondence Walters had with U.S.M. was on March 3, 1966, Dx CN. Mr. Powell testified on direct that he remembered writing and sending a letter to Mr. Walters dated October 7, 1966, Dx DQ, Powell Dep. 46:13-47:4. Yet, on cross-examination, and at his 1974 deposition, he testified that he did not remember the letter at all, Powell Dep. 55:2-3.

*DEFENDANTS FAIL TO ESTABLISH BY CLEAR
AND CONVINCING EVIDENCE THAT THE
BURGESS INVENTIONS WERE NOT ORIGINATED
BY HIM BUT WERE DISCLOSED TO HIM BY
POWELL*

Every successful inventor, in his journey between the womb and the Patent Office, finds the seed for his invention somewhere in the prior art. He adds to it his own original contribution which brings it to the level of patentable invention. If Powell did no more than show Burgess that you could make a back seam with hot-melt glue and a tape, he did no more than show Mr. Burgess to the prior art. It would no more provide a basis for a derivation defense than if Mr. Burgess had reached that

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stage by reading Bigelow Sanford's cited patent No. 2,395,257 to Dildilian, PX 14, issued twenty years earlier in 1946, or any of the numerous similar hot-melt back seaming patents cited.

For a derivation defense, Defendants must show that Powell disclosed more—at the least the concept of face seaming with a precoated hot-melt tape. Such a defense hangs solely on the oral testimony of Mr. Powell. Defendants have not produced a single contemporary document to support Mr. Powell's testimony. The only witnesses to the disclosure which Powell made to Mr. Burgess are Mr. Burgess himself and Mr. Hall. Their testimony does not corroborate Mr. Powell. Their testimony squarely contradicts him.

A case closely on point involving a defense of derivation, based on an alleged courier between an asserted prior inventor and a patentee, is *Johnson & Johnson v. W. L. Gore & Associates, Inc.*, 436 F.Supp. 704 (D.Del. 1977). In that case brought by Johnson & Johnson on one of its patents, the defendants showed that the invention had been previously made by certain technical personnel at duPont and attempted to prove that it had been relayed by a duPont salesman, Charles Carr, to certain Johnson & Johnson employees, including the inventors on the patent-in-suit. The testimony of those at Johnson & Johnson who had witnessed the disclosure which Mr. Carr claimed he had provided, did not support Mr. Carr's claims. Nor did any contemporary documentation support Mr. Carr's story. Accordingly, the defense failed for lack of corroboration (at p. 715). The Court concluded,

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"Derivation from a third party cannot be established unless communication to the named inventors is proved. Defendant has not carried its burden of proof with respect to that communication and consequently, the defense of derivation is without merit." [At p. 717]

The testimony of Mr. Hall and Mr. Burgess contradicts the testimony of Mr. Powell which is not supported by any 1966 documents. Accordingly, Defendants have failed to carry their burden of proof by clear and convincing evidence and the derivation defense fails.

Respectfully submitted,

FULWIDER, PATTON, RIEBER,
LEE & UTECHT
By LAURENCE H. PRETTY
Laurence H. Pretty
Attorneys for Plaintiff

Date: September 4, 1980

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of the State of California and of this Court and that the foregoing PLAINTIFF'S POST TRIAL BRIEF ON THE WALTERS' PRIOR INVENTION DEFENSE AND THE POWELL DERIVATION DEFENSE was served on Defendants Best Seam Incorporated, Vectron Industries, Inc. and Eugene J. Tasse this 4th day of September, 1980, by causing a copy to be hand delivered to the offices of Smyth, Pavitt, Siegemund, Jones and Martella, 4262 Wilshire Boulevard, Suite 320, Los Angeles, California 90010 to the attention of William H. Pavitt, Jr., Esq., attorneys for such Defendants.

LAURENCE H. PRETTY
Laurence H. Pretty